89-147 (1)

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DIXIE BROADCASTING, INC.,
MARTIN BROADCASTING OF ALABAMA, INC.,
AND BARCLAYS AMERICAN/BUSINESS CREDIT, INC.,
Petitioners,

v.

RADIO WBHP, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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89 pet.

QUESTIONS PRESENTED

1. Did the Court of Appeals err or abuse its discretion by applying an incorrect standard for determining whether or not the Debtors' filed their bankruptcy petition in good faith?

2. Did the Court of Appeals err or abuse its discretion by failing to apply the business judgment standard in affirming the Bankruptcy Court's implicit denial of the Debtors' motion to reject an executory contract?

LIST OF PARTIES

The petitioners are Dixie Broadcasting, Inc. and Martin Broadcasting of Alabama, Inc., two Alabama corporations, and Barclays American/Business Credit, Inc. International Television Corp. and Martin Broadcasting, Inc., both Vermont corporations, are affiliates of Dixie Broadcasting and Martin Broadcasting of Alabama.

Barclays American/Business Credit, Inc. is a subsidiary of BarclaysAmerican Corporation which is an affiliate of Barclays Bank of London, England. Barclays Bank of New York, N.A. is the only other domestic affiliate of Barclays Bank.

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The Petitioners, Dixie Broadcasting, Inc. ("Dixie"), Martin Broadcasting of Alabama, Inc. (individually, "Martin Broadcasting" and, together with Dixie, the "Debtors"), and Barclays American/Business Credit, Inc. ("Barclays"), respectively pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above case on April 28, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is reported as *Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc. (In re Dixie Broadcasting, Inc.)*, 871 F.2d 1023 (11th Cir. 1989).

The opinions of the District Court and the Bankruptcy Court are unreported; they are reprinted in the Appendix at pages 14a-39a.

JURISDICTION

Pursuant to 28 U.S.C. Section 158(d), Petitioners separately appealed from an order of the District Court for the Northern District of Alabama which affirmed in part and remanded in part an order of the Bankruptcy Court for the Northern District of Alabama lifting the automatic stay under 11 U.S.C. Section 362. The Court below entered judgment and an opinion on April 28, 1989, affirming that part of the district court opinion that affirmed the bankruptcy court's lift stay order (and dismissing the appeal with respect to that part of the District Court's opinion remanding to the Bankruptcy Court the issue of dismissal of the bankruptcy cases). No petitions for rehearing were filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The statutes involved in the case include 11 U.S.C. Sections 362, 365 and 1112 and are set out verbatim in the Appendix at pages 42a-60a.

STATEMENT OF THE CASE

A. Background

Dixie is the owner and operator of radio stations WHOS-AM and WDRM-FM, in Decatur, Alabama. It holds a Federal Communications Commission ("FCC") broadcast license for each station.

Martin Broadcasting is a holding company for Dixie stock and has no separate business. It is the sole shareholder of Dixie.

Barclays is the primary secured creditor and has a security interest in all pre-petition real and personal property of Dixie by virtue of a security agreement executed on May 10, 1984.

In May 1984, Dixie and Radio WBHP, Inc. ("WBHP") executed a purchase and sale agreement (and an amendment thereto) pursuant to which WBHP was to buy Dixie's FM station (the "Contract"). The contract provided for the sale by Dixie of the assets associated with its FM station, free and clear of liens, and included agreements, to be executed at closing by Dixie and its president, Donald Martin, not to compete with WBHP within a specified territory. The sale was never consummated.[1]

In July 1984, WBHP commenced an action against Dixie and its president, Donald Martin, in the Circuit Court of Madison County, Alabama seeking an injunction against any transfer of Dixie's FM assets to a third party and specific performance of the Contract or, alternatively, money damages in the amount of $1,000,000. The issues involved in that lawsuit have not been resolved.[2]

On January 30, 1987, Dixie and Martin each filed a voluntary petition to reorganize under Chapter 11 of the Bankruptcy Code. With the commencement of the Chapter 11 cases, the state court action became subject to the automatic stay.

Dixie was at the time that it filed for bankruptcy and continues to be (as a debtor-in-possession) an operating

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[1] The Debtors contend that the sale was never consummated due to the failure of a condition precedent, namely, the approval of Barclays. WBHP contends that the failure to consummate the transaction was a breach by Dixie. This dispute was before the state court at the time that the bankruptcy petitions were filed.

[2] Among other things, the state court directed the parties to file a declaratory ruling request with the FCC. The FCC has not ruled on that request.

corporation. On the petition date, Dixie employed approximately 22 full-time employees. In addition to its two FCC licenses, Dixie's assets included broadcast equipment, office and studio equipment, a library of records and tapes, real estate leases for its two transmission tower sites and its studio sites, receivables, good will or going concern value, and cash on hand.

On the petition date Dixie had over forty unsecured creditors, not counting tax authorities. The liquidated, non-contingent, non-insider claims of these unsecured creditors are for various trade, lease and bank debts and total approximately $75,000. The unsecured claims of insiders are for operating loans and advances, legal services and lease debt and exceed $600,000. In addition, the Internal Revenue Service had undisputed claims [3] for delinquent tax debts of approximately $30,400,[4] exclusive of any interest or penalty charges, and the State of Alabama holds undisputed tax claims of close to $6,600.

The Debtors also had three secured creditors, the most significant of which, Barclays, is a petitioner herein. Barclays has a claim of more than $1,060,000 based on a guarantee by Dixie and a valid, perfected security interest in all of Dixie's pre-petition property.[5]

On February 23, 1987, WBHP filed a Motion to Dismiss, or, in the Alternative, Motion for Relief. In that motion, WBHP asked for alternative forms of relief—dismissal of the Chapter 11 cases, abstention, or termi-

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[3] Pursuant to authorization granted by the Bankruptcy Court, Dixie paid the Internal Revenue Service $23,610.72 on or about February 29, 1988.

[4] The Internal Revenue Service also has claims for the years 1981 through 1983, as evidenced by recorded tax liens totalling $40,900, which Dixie disputes.

[5] The claims of the other two secured creditors, which totaled almost $140,000 on the petition date, have been paid off by Donald Martin personally.

nation of the automatic stay to allow WBHP's to proceed with its state court lawsuit. The Bankruptcy Court conducted an evidentiary hearing with regard to WBHP's motion on March 25-26, 1987. It did not rule immediately.

On March 24, 1987, Dixie filed its Motion to Reject Executory Contract Pursuant to Section 365 ("Motion to Reject"), seeking court approval to reject the Contract. The effect of rejection under the Bankruptcy Code would be to award WBHP money damages in lieu of specific performance and to give the Debtors the chance to satisfy all of their creditor claims and preserve their businesses. The Bankruptcy Court scheduled the Motion to Reject for hearing on June 5, 1987.

B. The Decision Below

At the June 5th hearing, the Bankruptcy Court did not directly rule on the Motion to Reject. Instead, later that day, it issued an order lifting the automatic stay to allow the continuance of WBHP's state court lawsuit. In that order, the Bankruptcy Court found that Dixie had filed its petition "for the primary purpose of (1) avoiding the consequences of an anticipated adverse state court decision; (2) relitigating the same controversy between the two parties in bankruptcy forum; and (3) invoking the automatic stay provision to evade the pending state court litigation." It concluded that "[s]uch action on the part of Dixie and its representation constitutes bad faith and, therefore, sufficient cause exists to grant WBHP relief from the stay." [6] The Bankruptcy Court never considered

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[6] At the June 5th hearing, the Bankruptcy Court announced from the bench that it was inclined to lift the stay because it believed that the Contract was subject to specific performance whether it was heard in the Bankruptcy Court or the state court and because it was unsure how to measure damages. It also announced that it had asked counsel for WBHP to propose an order "along those lines." The written order containing the rationale quoted above,

whether the Debtors' retention of its FM assets was necessary for an effective Chapter 11 reorganization.

Pursuant to 28 U.S.C. Section 158(a), the Debtors and Barclays each appealed from the Bankruptcy Court order. WBHP cross-appealed based on the Bankruptcy Court's failure to dismiss the cases.

The District Court affirmed the lift stay order without any significant legal analysis or citation to pertinent authority.[7] It remanded to the Bankruptcy Court the issue of whether the cases should have been dismissed.

Pursuant to 28 U.S.C. Section 158(d), the Debtors and Barclays each appealed from the District Court order. In an order issued on April 28, 1989, the Court of Appeals for the Eleventh Circuit affirmed the District Court's affirmance of the Bankruptcy Court's lift stay order.[8]

REASONS FOR GRANTING THE WRIT

I. The Decision Below Applies Inappropriate Factors Concerning Good Faith Chapter 11 Filing.

Because the Bankruptcy Code neither defines nor requires a good faith filing under Chapter 11, one must look to case law for the standard of good faith. In the decision below, the Eleventh Circuit employed a standard

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which was signed on the same day without having been furnished to counsel for the Debtors or Barclays for comments, apparently is the order proposed by WBHP.

[7] In addition to failing to articulate any independent basis of or rationale for its decision, the District Court apparently failed even to realize that the Debtors had filed an appeal. Twice in its Memorandum Opinion it asserted that Barclays brought the appeal and that WBHP cross-appealed.

[8] The Eleventh Circuit dismissed that part of the appeal which sought review of the District Court's remand of the issue of dismissal. It did so based upon its determination that the remand order was not a "final order" for purposes of appeal.

of good faith in marked contrast with the standards applied in other circuits.

The Eleventh Circuit ruling that the Bankruptcy Court did not err in finding that Dixie had filed its Chapter 11 petition in "bad faith", 871 F.2d at 1028, was based upon findings that Dixie was not in financial distress and that Dixie filed for bankruptcy to avoid the Contract. 871 F.2d at 1027. The Eleventh Circuit also found badges of bad faith in the timing of the filing of the Debtors' petitions, statements made by an officer of Dixie, and the situation surrounding Dixie's grant of a security interest approximately three years prior to the bankruptcy filing. 871 F.2d at 1026-27. The Court did not consider the Debtors' ability to reorganize or the effect lifting the automatic stay would have on Dixie's financial condition.

A. *Insolvency is An Inappropriate Factor to Determine Good Faith.*

The Eleventh Circuit placed great importance on its finding that the debtor was not in "financial distress" at the time the petition was filed. 871 F.2d at 1027. The court noted that Dixie was "substantially current on its debts. . . ." 871 F.2d at 1027. In addition, the court detailed salaries of officers and employees restating the District Court's finding that "[t]hese facts are not indicative of a business in financial distress." 871 F.2d at 1027. Unfortunately, the Court did not consider the impact on the salaries of officers and employees, and Dixie's ability to remain "current on its debts", should the state court order that the agreement with WBHP be enforced.

However, a debtor's current ability to service its debts and meet its payroll does not necessarily indicate whether the debtor may face impending and foreseeable financial distress. It can evidence an ability and desire to meet the need to successfully reorganize to avoid anticipated financial misfortune.

Wisely, other circuit courts have either rejected or avoided any insolvency requirement such as adopted by the Eleventh Circuit in *Dixie Broadcasting*. In *Heisley v. U.I.P. Engineered Products Corp. (In re U.I.P. Engineered Products Corp.)*, 831 F.2d 54 (4th Cir. 1987), the Fourth Circuit rejected the idea that a bankruptcy filing by a solvent corporation is necessarily in bad faith. Specifically, it affirmed the bankruptcy court's denial of a motion to dismiss, finding that even though two corporations were solvent, their bankruptcy filings were not in bad faith where they were otherwise justified—in that case by the appropriateness of their corporate parent including the two corporations in its reorganization. *See Connell v. Coastal Cable T.V., Inc. (In re Coastal Cable T.V., Inc.)*, 709 F.2d 762, 764 (1st Cir. 1983), *aff'd*, 767 F.2d 904 (1st Cir. 1985) ("a person in bankruptcy, while not necessarily insolvent, *see* 11 U.S.C. Section 109, must at least owe debts"); *In re Stolrow's, Inc.*, 84 B.R. 167, 171 (9th Cir. BAP 1988) ("neither insolvency nor inability to pay debts is a prerequisite to seeking voluntary relief under the Bankruptcy Code"); *In re Johns-Manville Corp.*, 36 B.R. 727, 737 (Bankr. S.D.N.Y.), *appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984).

B. *Need to Avoid Executory Contracts is An Inappropriate Factor to Determine Good Faith.*

The Eleventh Circuit found that Dixie's Chapter 11 petition was filed to avoid the Contract with WBHP. 871 F.2d at 1027. This finding was listed as a consideration in determining that the Chapter 11 petition was filed in bad faith. 871 F.2d at 1027.

Section 365(a) of the Bankruptcy Code specifically provides that a trustee, or in this case a debtor-in-possession, may reject an executory contract. 11 U.S.C. Section 365(a). To conclude that a debtor-in-possession may avail itself of the benefits of section 365 only at the risk of losing its mantle of good faith effectively chills one of the more important rights under bankruptcy law and undermines an indispensable vehicle for successful

reorganization. *See generally Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303 (5th Cir. 1985).

C. *Timing of a Bankruptcy Filing is An Inappropriate Factor to Determine Good Faith.*

The Eleventh Circuit's focus on the timing of the Debtors' Chapter 11 filing in Dixie Broadcasting ignores the basic realities of bankruptcy. It is the nature of debtors that they typically resist filing for bankruptcy until they have no choice. Consequently, debtors often do not file until they are facing foreclosure, judgment on a lawsuit or other imminent creditor relief. If this delay until all other alternatives have been exhausted is taken as an indicium of bad faith, many debtors who otherwise might succeed in resolving their financial difficulties outside of court will have to file early bankruptcy petitions to protect their right to do so. This, in turn, will place an additional burden on the already overburdened bankruptcy court system.

Further, there is a conflict regarding whether the timing of a bankruptcy filing is indicative of bad faith. The Eleventh Circuit's reliance on the timing of the Debtors' filings is inconsistent with the Fourth Circuit's determination in *U.I.P.* that the petitions were not filed in bad faith even though they were filed just hours before an order of specific performance was to be entered. *U.I.P.*, 831 F.2d at 56.

D. *The Debtor's Statements and Prepetition Activity Are Inappropriate Factors to Determine Good Faith.*

As previously stated, the Eleventh Circuit pointed to certain statements made by the Debtor, and activity occurring up to three years prior to the filing of the petition, in support of a finding of bad faith. 871 F.2d at 1027. Observations of this type are poor indicators of good faith because they have little bearing on the functions and purposes of Title 11 reorganization.

In contrast to the Eleventh Circuit's opinion in *Dixie Broadcasting*, the Fifth Circuit has concluded that "the conclusions of the bankruptcy court in this case, based solely on the statements of the debtor's counsel and the litigation tactic of attempting to retry the state court action in the course of the hearing on the motion for relief from the stay, did not provide sufficient evidence to show lack of good faith." *Little Creek Development Company v. Commonwealth Mortgage Corp. (In re Little Creek Devel. Co.)*, 779 F.2d 1068, 1073 (5th Cir. 1986).

There is also a split of authority on whether a court should utilize the good faith inquiry as a license to moralize on the pre-filing activities of a debtor many years before the bankruptcy as indication of a bad faith Chapter 11 filing. In *Dixie Broadcasting*, the Eleventh Circuit characterized in a negative manner activities of the Debtors almost three years before the petition date as indicative of bad faith in filing the petitions. *Dixie Broadcasting*, 871 F.2d at 1027. That approach is in marked contrast to the approach of Bankruptcy Courts in the Second and Third Circuits which eschew a broad inquiry into a debtor's pre-bankruptcy activities. *In re Johns-Manville*, 36 B.R. 727, 737 (Bankr. S.D.N.Y.), *appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984):

> This Court thus expressed the policy rationale contained within the Second Circuit's pronouncement in [*Banque de Financement v. First Nat'l Bank of Boston*, 568 F.2d 911 (2d Cir. 1977)] that a Chapter 11 filing creates a bankruptcy estate which exists for the benefit not simply of the debtor, but rather also for the benefit of all of the debtor's creditors and equity holders. The filing triggers the springing into existence of important constituencies which, along with the debtor, must be protected by a reorganization court. Accordingly, the intense focus on the debtor's motives in filing is misplaced.

In re W & L Assoc., Inc., 71 B.R. 962, 963 (Bankr. E.D. Pa. 1987) (the concept of bad faith "should not be used

as a license to moralize on the conduct of, or second guess, a debtor").[9] *See also In re Clinton Centrifuge, Inc.*, 72 B.R. 900, 905 (Bankr. E.D. Pa. 1987).

II. The Decision Below Conflicts With Decisions of Other Circuits Which Apply the Proper Factors to Determine Good Faith.

A. *Factors To Determine Good Faith Should Indicate An Abusive Filing.*

There is no direct statutory authority for the "good faith" filing requirement employed by many courts to justify granting relief from the automatic stay. Instead, "good faith" is a judicially imposed requirement which falls under the rubric of "cause" for lifting the stay. 11 U.S.C. Section 362(d).

Traditionally, the good faith filing standard has been employed to protect against abusive filing, such as the "new debtor syndrome." In that scenario, a single asset entity is created or revitalized on the eve of foreclosure to isolate the insolvent entity and its creditors. The resulting debtor is an entity with only one asset, no ongoing business, no employees, no real creditors and, most significantly, neither the need nor the ability to reor-

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[9] There is also an inconsistency between the Eleventh and the Seventh Circuits concerning the effect of subsequent activity on a determination that a filing was in bad faith. The Eleventh Circuit has stated that "the taint of a petition filed in bad faith must naturally extend to any subsequent reorganization proposal." *Natural Land Corp. v. Baker Farms, Inc. (In re Natural Land Corp.)*, 825 F.2d 296, 298 (11th Cir. 1988). *Phoenix Piccadilly, Ltd. v. Life Ins. Co. of Virginia (In re Phoenix Piccadilly, Ltd.)*, 849 F.2d 1393, 1395 (11th Cir. 1988). That position is in contrast to that of the Seventh Circuit in *In re Madison Hotel Assoc.*, 749 F.2d 410, 426 (7th Cir. 1984). In that case, the Seventh Circuit accepted a Bankruptcy Court finding that "there have been sufficient efforts to reorganize undertaken by the debtor to rebut any contention that there would be a lack of good faith in the initial filing of the Chapter 11."

ganize. Thus, the debtor in a new entity situation is not the type of entity for which Congress intended the reorganization provisions of the Bankruptcy Code. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977):

> The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business' finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.

B. *The Decision Below Is In Conflict With The Fifth Circuit.*

In several circuits, the standards of good faith are clearly designed specifically to address the new debtor syndrome. For example, one of the oft cited cases in the good faith area is the Fifth Circuit's decision in *Little Creek Development Company v. Commonwealth Mortgage Corp. (In re Little Creek Devel. Co.)*, 779 F.2d 1068 (5th Cir. 1986). *Little Creek* involved a situation in which a developer borrowed money from a mortgage company and, when the developer failed to obtain building permits and a satisfactory replacement guarantor, the mortgage company sought to accelerate its debt and foreclose its mortgages. The developer obtained a state court injunction, but that injunction was conditioned on posting a large bond. Because it was unable to post that bond, the developer filed for relief under Chapter 11. In subsequent hearings on the mortgage company's motion to lift the automatic stay, counsel for the developer admitted that the only reason that his client had filed bankruptcy was because it was unable to post the bond. Based upon that admission, the Bankruptcy Court found that the petition had been filed in bad faith and, therefore, cause existed to lift the automatic stay.

In reversing and remanding the Bankruptcy Court determination of bad faith, the Fifth Circuit focused on the new debtor syndrome and whether there was an on-

going business to reorganize and a reasonable prospect of reorganization. It found that the determination of whether or not a filing was in good faith depended on an "on the spot evaluation of the debtor's financial condition, motives, and the local financial realities." 779 F.2d at 1072. It then gave a list of factors which exemplify a bad faith filing and concluded that, when such factors are present,

> [r]esort to the protection of the bankruptcy laws is not proper under these circumstances because there is no going concern to preserve, there are no employees to protect, and there is no hope of rehabilitation, except according to the debtor's "terminal euphoria."

C. *The Decision Below Is In Conflict With The Sixth Circuit.*

In reaching its conclusion in *Little Creek*, the Fifth Circuit cited the decision of the Sixth Circuit in *In re Winshall Settlor's Trust*, 758 F.2d 1136 (6th Cir. 1985). That case involved a motion to dismiss [10] which was upheld by the district court and the Sixth Circuit on "bad faith" grounds.[11] Like the Fifth Circuit in *Little Creek*, the Sixth Circuit in *Winshall's Trust* focused on whether

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[10] Like the good faith filing requirement that they have read into the "for cause" standard of section 362(d), courts have read a good faith filing requirement into the "for cause" standard for dismissing a case under section 1112(b). The court below found the factors used to demonstrate bad faith to be the same in both contexts. 871 F.2d at 1029 (explaining its statement in *Phoenix Piccadilly, Ltd. v. Life Ins. Co. of Virginia (In re Phoenix Piccadilly, Ltd.)*, 849 F.2d 1393, 1394 (11th Cir. 1988) that "what amounts to bad faith is the same for both proceedings").

[11] The Bankruptcy Court originally dimissed the petition because the debtor had failed to prove that it was a business trust and, therefore, was not entitled to be a debtor under section 109(d) of the Bankruptcy Code and because there was no business being conducted at the time of filing.

there was a business to reorganize and a reasonable probability of reorganization.

> Factors relevant in examining whether a Chapter 11 petition has been filed in good faith include whether the debtor had any assets, whether the debtor had an ongoing business to reorganize, and whether there was a reasonable probability of a plan being proposed and confirmed.

758 F.2d at 1137.

Again, the decision below is inconsistent with the decisions of the Fifth Circuit in *Little Creek* and the Sixth Circuit in *Winshall's Trust*. Under the good faith standards employed by those courts, the Debtors' petitions were filed in good faith. Clearly, Dixie is an ongoing business with employees, assets and creditors. Moreover, it had a reasonable prospect of proposing and confirming a plan of reorganization had the court allowed its management to exercise their business judgment, reject the Contract, and pay WBHP money damages. Thus, had the Debtors been located in the Fifth or Sixth Circuits, rather than the Eleventh, they would not now risk losing their primary asset, WDRM-FM, the loss of which would jeopardize their ability to reorganize.

D. *The Decision Below Is In Conflict With The Ninth Circuit.*

The decision of the court below is also in conflict with the decision of the Ninth Circuit in *State of Idaho, Dept. of Lands v. Arnold (In re Arnold)*, 806 F.2d 937 (9th Cir. 1986).[12] *Arnold* involved a debtor who owned a parcel

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[12] There is also an inconsistency between the Eleventh and the Seventh Circuits concerning the effect of subsequent activity on a determination that a filing was in bad faith. The Eleventh Circuit has stated that "the taint of a petition filed in bad faith must naturally extend to any subsequent reorganization proposal." *Natural Land Corp. v. Baker Farms, Inc. (In re Natural Land Corp.)*, 825 F.2d 296, 298 (11th Cir. 1988), *Phoenix Piccadilly*, 849 F.2d

of land subject to a security interest. When the debtor proposed a reorganization plan in which the secured creditor would receive less than the full purchase price, the creditor moved to lift the automatic stay. Although the bankruptcy court refused to do so, the district court reversed. On appeal, the Ninth Circuit reversed the district court, finding no showing of bad faith. To reach that conclusion, it mentioned the need to examine the amalgam of factors referred to in *Little Creek* and the debtor's financial status, motive and the local economic environment. It concluded that "[g]ood faith is lacking only when the debtor's actions are a clear abuse of the bankruptcy process." 806 F.2d at 939.

A similar analysis is reflected in *Connell v. Coastal Cable T.V., Inc.* (*In re Coastal Cable T.V., Inc.*), 709 F.2d 762 (1st Cir. 1983), *aff'd*, 767 F.2d 904 (1st Cir. 1985), a case in which the First Circuit found that in order for a debtor to avail itself of bankruptcy, it must owe debts and must not have a fraudulent purpose.

E. *The Decision Below Creates Regional Disparity In The Application of Bankruptcy Law.*

Because of the conflict between the Eleventh Circuit's *Dixie Broadcasting* decision and the decisions of the other circuits regarding good faith, whether a petition is found to have been filed in good faith will depend not only on such factors as the debtor's need and ability to reorganize, but also on where the debtor filed its petition. By interpreting section 362(d) to create this regional disparity, the courts have rendered that section violative of the Con-

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1393, 1395 (11th Cir. 1988). That position is in contrast to that of the Seventh Circuit in *In re Madison Hotel Assoc.*, 749 F.2d 410, 426 (7th Cir. 1984). In that case, the Seventh Circuit accepted a Bankruptcy Court finding that "there have been sufficient efforts to reorganize undertaken by the debtor to rebut any contention that there would be a lack of good faith in the initial filing of the Chapter 11."

stitution's uniformity requirement for bankruptcy laws. Only by declaring a uniform national standard for evaluating good faith can this Court cure the Constitutional infirmity.

Article 1, section 8, clause 4 of the Constitution empowers Congress to enact bankruptcy laws that are uniform throughout the United States. The uniformity referred to in that clause is geographical. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902). Thus, "[t]o survive scrutiny under the bankruptcy clause, a law must at least apply uniformly to a defined class of creditors." *Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 473 (1982).

That is not the situation with the disparate application of the good faith filing requirement. Had the Debtors been able to file in California or New York or Pennsylvania, instead of in Alabama, in all likelihood their petitions would have been found to have been filed in good faith. As a result, the automatic stay would not have been lifted and the Debtors would be in a position to reject the Contact and to formulate and propose a plan of reorganization. Moreover, had the Debtors filed in California or New York or Pennsylvania, there would be no question of dismissing the bankruptcy petitions.

This Court must hold the federal courts to the same standard in their interpretation and application of the bankruptcy laws that the Constitution requires of Congress in enacting those laws. Otherwise, the interpretation and application of the statute would render it unconstitutional. Thus, the current split among the circuits over the proper interpretation and application of the good faith filing requirement cannot be allowed to persist.

III. The Decision Below Affirming the Bankruptcy Court's Implicit Denial of the Motion to Reject Conflicts With Decisions of Other Courts of Appeals Concerning a Debtor's Right to Reject Executory Contracts in Bankruptcy.

A. *Failure of the Lower Court to Apply the Business Judgment Test Conflicts With Other Circuit Court Decisions.*

Section 365 of the Bankruptcy Code provides that the trustee, subject to the court's approval, may assume or reject any executory contract of the debtor. 11 U.S.C. Section 365(a). While the Code does not expressly provide a standard for determining whether to approve assumption or rejection, courts employ the business judgment test.

In the present case, the Bankruptcy Court did not explicitly rule on the Motion to Reject. Instead, by lifting the stay to allow WBHP to proceed with its state court suit seeking specific performance of the Contract, the Bankruptcy Court implicitly denied the Motion to Reject. In so doing it failed to apply the proper standard—i.e., the business judgment test—or, indeed, any test that considered the effect that rejection of the Contract would have on the Debtors' bankruptcy estates.

By affirming the lift stay order, the decision below adopts and approves the effective denial of the Motion to Reject without regard to whether Dixie's decision to reject was a valid business judgment and without determining the effect rejection would have on the bankruptcy estates. In so doing, the decision below is in marked contrast to the decision of the Fourth Circuit in *Lubrizol Enterp., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986). In *Lubrizol*, the Fourth Circuit recognized the business judgment test as the proper standard for determining whether or

not a debtor's motion to reject an executory contract should be granted. 756 F.2d at 1047 ("The issue thereby presented . . . is whether the decision of the debtor that rejection will be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.").

The decision below is also inconsistent with decisions of the Second and Tenth Circuits, in which those courts found the business judgment test to be the appropriate standard for determining whether or not to approve a debtor's motion to assume or reject under the Bankruptcy Act. *See Control Data Corp. v. Zelman (In re Minges)*, 602 F.2d 38, 43 (2d Cir. 1979) (finding the business judgment test to be applicable to the determination of whether or not to approve rejection of certain covenants of a lease); *Carey v. Mobil Oil Corp. (In re Tilco, Inc.)*, 558 F.2d 1369 (10th Cir. 1977) (finding that the business judgment principle applied in determining whether to approve the rejection of contracts for the sale of natural gas).

B. *The Decision of the Lower Court Ignores the Clear Mandate of the Bankruptcy Code.*

The decision of the lower court to grant relief from the automatic stay and the denial of the Motion to Reject without applying the proper standard and without regard to the effect of such denial on the bankruptcy estates denies Dixie the use of a valuable bankruptcy tool granted by Congress—i.e., its right to reject executory contracts under section 365 of the Bankruptcy Code.[13]

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[13] Congress' intent is made clear in the legislative history to section 1107(a). This section places a debtor-in-possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a Chapter 11 trustee. He is required to perform the functions and duties of a Chapter 11 trustee (except the investiga-

See 11 U.S.C. Section 1107(a). By ignoring the clear mandate of the Code, the decision below (and that of the Bankruptcy Court) has inexplicably ignored the basic precept that "whatever equitable powers remain in the bankruptcy court must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank of Worthington v. Ahlers*, —— U.S. ——, 108 S. Ct. 963 (1988). As Justice Rehnquist pointed out in *Midatlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 514 (1986) (Rehnquist, J., dissenting):

> While the Bankruptcy Court is a court of equity, the Bankruptcy Code "does not authorize freewheeling consideration of every conceivable equity." Bildisco & Bildisco, 465 U.S., at 527. The Bankruptcy Court may not, in the exercise of its equitable powers, enforce its view of sound public policy at the expense of the interests the code is designated to protect.

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tive duties). He is also subject to any limitations on a Chapter 11 trustee, and to such other limitations and conditions as the court prescribes. H.R. Rep. No. 595, 95th Cong., 1st Sess. 404 (1977), S. Rep. No. 989, 95th Cong., 2d Sess. 116 (1978).

CONCLUSION

For these reasons, Petitioners respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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July 27, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 88-7035

IN RE DIXIE BROADCASTING, INC. and
MARTIN BROADCASTING OF ALABAMA, INC.,
Debtors.

BARCLAYS-AMERICAN/BUSINESS CREDIT, INC.,
Plaintiff-Appellant,

DIXIE BROADCASTING, INC. and MARTIN BROADCASTING,
Plaintiffs-Appellants,

v.

RADIO WBHP, INC.,
Defendant-Appellee.

April 28, 1989

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and TIDWELL,* District Judge.

RONEY, Chief Judge:

This is an appeal by two debtor corporate owners of a radio station, and its secured creditor, from a bankruptcy court order lifting the automatic stay of 11 U.S.C.A § 362, which was affirmed by the district court. The removal of the stay cleared the way for continuation of state court litigation in which another radio station

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* Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.

sought specific performance by the debtors of a contract to sell their station. Also under attack is the district court's order remanding the case to the bankruptcy court for a determination of whether the debtors filed the bankruptcy petition in bad faith for purposes of dismissal. We affirm the order lifting the stay, but dismiss the appeal from the remand order for lack of jurisdiction.

Background

Debtor-appellant Dixie Broadcasting, Inc. is the owner of radio stations WHOS-AM and WDRM-FM in Decatur, Alabama. Debtor/appellant Martin Broadcasting of Alabama, Inc. was formed for the sole purpose of acquiring Dixie stock and is its sole shareholder. Donald G. Martin and J. Mack Bramlett are the president and vice-president of both Dixie and Martin. Martin and Bramlett also have engaged in other businesses together, including coal mining and leasing of coal mining equipment through various corporations and joint ventures, and they control other radio and television stations in Vermont and Alabama.

Appellee Radio WBHP is a "stand alone" AM radio station broadcasting out of Huntsville, Alabama, and is owned by W.H. Pollard, Jr. After on-and-off negotiations for a period of three years, Dixie entered into a Memorandum of Agreement on April 11, 1984, to sell WDRM to WBHP for $925,000. A Purchase and Sale Agreement was executed on May 17, 1984. Despite the executed purchase and sale agreement, Dixie apparently continued to entertain other offers to purchase the station. Colonial Broadcasting Co., which had offered to buy WDRM in 1983 for $875,000, purportedly upped its price to $1.25 million in June 1984. Dixie then refused to join WBHP in its application for a transfer of the FCC license from WDRM to WBHP, as required in the agreement. Dixie's attorney wrote to WBHP that the reason Dixie could not join in the application was that appellant Barclays-

American/Business Credit, Inc., a secured creditor of Dixie, had refused to consent to the sale of the station.

Barclays was a secured creditor by virtue of a May 10, 1984, security interest executed by Dixie which extended and amended a prior loan guarantee with a principal of $1 million secured by all of the real and personal property of Dixie, both tangible and intangible, used in connection with the station, including the FCC license and 100 percent of the issued and outstanding Dixie capital stock. This agreement, executed after Dixie and WBHP had completed their memorandum of agreement on April 11, but before the final purchase and sale agreement of May 17, gave Barclays the right to withhold consent to the sale of Dixie's assets. The loan for which Dixie executed the security agreement was for Martin and Bramlett's coal mining and related operations.

When WBHP heard of the Colonial offer, it filed suit against Dixie and Martin in an Alabama circuit court. This court enjoined Martin and Dixie from transferring WDRM to anyone other than WBHP and later entered partial summary judgment for WBHP, ordering Dixie to join with it in an FCC application. Several months later, the court vacated the partial summary judgment in response to Dixie and intervenor Barclay's motion suggesting the court had failed to consider Barclay's security interest when it entered the summary judgment. The court then directed WBHP to seek a declaratory ruling before the FCC.

WBHP sought reconsideration of the court's order. After a two-hour argument on this motion in a December 5, 1986 hearing, the court told the parties that it was ready to rule in WBHP's favor, but that it needed to recess the hearing for a few hours and ordered the parties to meet during this time to try to settle the litigation. The parties did meet and for the first time, the debtors mentioned the potential of filing for bankruptcy. No resolution was reached and the parties resumed negotiations

during a January 30, 1987 meeting. It was during a lunch break in this negotiation session that Dixie and Martin filed for Chapter 11 bankruptcy.

WBHP sought dismissal of Dixie's petition, or in the alternative, relief from the automatic stay granted by section 362(a) of the Code. The bankruptcy court first found that because an FCC broadcasting license is not readily obtainable in the open market, and because there were no other FCC FM broadcasting station licenses available in the North Alabama market, the license at issue here was unique and WBHP's interest could not be adequately protected while a stay was in effect. The court further found that Dixie filed its petition:

> [F]or the primary purpose of (1) avoiding the consequences of an anticipated adverse state court decision; (2) relitigating the same controversy between the two parties in bankruptcy forum; and (3) invoking the automatic stay provision to evade the pending state court litigation.

Order Terminating Stay at 15. The court noted that the litigation had been pending for two and one-half years and was on the verge of completion when Dixie filed its petition "in order to obtain a last-minute escape chute out of the civil litigation." *Id.* The court concluded that Dixie's actions amounted to bad faith and justified relief from the stay.

On appeal, the district court stated that it had reviewed the order, was convinced that it was correct and that the stay was due to be lifted. Nevertheless, the court remanded the case back to the bankruptcy court for further proceedings on the bad faith filing issue. Although reciting numerous facts such as the timing of events, the financial health of Dixie, and the debt which Dixie secured but received no benefit from, which "more than merely intimate a bad faith filing," the court found that the "motive, intent and need" of the debtors was still subject

to question. Thus, the bankruptcy court was instructed to hold a hearing and make a finding as to the debtors' good faith in filing the petition. The court further instructed the bankruptcy judge to dismiss the petition should he find bad faith.

The Automatic Stay

Under 28 U.S.C.A. § 158(d), the federal appellate courts have jurisdiction in bankruptcy cases over "appeals from all final decisions, judgments, orders, and decrees" of the district courts. A district court order affirming or reversing the bankruptcy judge's grant or denial of relief from an automatic stay consistently has been held by the courts to be a final decision reviewable on appeal. *See, e.g., In re Regency Woods Apartments, Ltd.*, 686 F.2d 899, 902-03 (11th Cir.1982); *In re Sun Valley Foods Co.*, 801 F.2d 186, 190 (6th Cir.1986); *In re Boomgarden*, 780 F.2d 657, 659-60 (7th Cir.1985); *Grundy Nat'l Bank v. Tandem Mining Corp.*, 754 F.2d 1436, 1439 (4th Cir. 1985); *In re American Mariner Indust., Inc.*, 734 F.2d 426, 429 (9th Cir. 1984); *In re Leiner*, 724 F.2d 744, 745 (8th Cir.1984); *In re Comer*, 716 F.2d 168, 172 (3d Cir.1983); *In re Taddeo*, 685 F.2d 24, 26 n. 4 (2d Cir.1982).

An automatic stay may be terminated for "cause" pursuant to section 362(d)(1) of the Bankruptcy Code. The statute specifically provides that "the lack of adequate protection of an interest in property" is cause to lift a stay. Further, a petition filed in bad faith also justifies relief from a stay. *In re Natural Land Corp.*, 825 F.2d 296 (11th Cir.1987). A decision to lift the stay is discretionary with the bankruptcy judge, and may be reversed only upon a showing of abuse of discretion. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 814 F.2d 844 (1st Cir.1987); *In re Holtkamp*, 669 F.2d 505 (7th Cir.1982).

The bankruptcy court found both that WBHP's interest was inadequately protected given the unique character of

an FCC license and that Dixie's actions amounted to bad faith. On appeal, Dixie argues that WBHP's unsecured, prepetition and unliquidated contract claim is not entitled to adequate protection, but that it nonetheless is protected because the value of the radio station has steadily increased. WBHP does not address the adequate protection argument, contending that the presence of bad faith alone compels relief from the stay in this case.

We hold that the bankruptcy court did not err in its determination that there was bad faith to justify lifting the stay. The evidence of bad faith in this case includes:

(1) the filing of the petition during a lunch recess in eleventh-hour court ordered settlement negotiations in the state court litigation;

(2) use of bankruptcy proceedings despite the apparent good financial health of the debtor;

(3) use of bankruptcy to avoid a contract that had become less profitable in light of a better purchase offer;

(4) execution of a security agreement giving Barclays the right of consent to a sale of Dixie's assets on May 10, 1984, *after* Dixie and WBHP had entered into a Memorandum of Agreement to sell the station, and just one week prior to execution of the Purchase and Sale Agreement;

(5) use of Dixie's assets to secure a loan which benefited some of Donald Martin's other enterprises and the sale of one of these enterprises on which Barclays had a collateral assignment and lien at the same time Dixie entered into the security agreement; and

(6) Mr. Bramlett's statements to creditors that the petition was filed as a "diversionary tactic" and that Dixie was not in financial distress.

Although there is no precise test for determining bad faith, courts have recognized factors which show an "intent to abuse the judicial process and the purposes of the reorganization provisions." *Natural Land*, 825 F.2d at 298. These factors include the timing of the filing of the petition, *id.*; whether the debtor is "financially distressed," *In re Waldron*, 785 F.2d 936, 939 (11th Cir.), *cert. dismissed sub nom. Waldron v. Shell Oil Co.*, 478 U.S. 1028, 106 S.Ct. 3343, 92 L.Ed.2d 763 (1986); whether the petition was filed strictly to circumvent pending litigation, *Holtkamp*, 669 F.2d at 508; and whether the petition was filed solely to reject an unprofitable contract, *Waldron*, 785 F.2d at 939-41. *See also Furness v. Lilienfield*, 35 B.R. 1006 (D.Md.1983) (petition dismissed which had been filed just prior to district court civil RICO trial after a continuance in the trial had been denied); *In re Wally Findlay Galleries (New York), Inc.*, 36 B.R. 849 (Bankr.S.D.N.Y.1984) (petition dismissed which was filed the same day judgment entered against debtor in state court); *In re Smith*, 58 B.R. 448 (Bankr. W.D.Ky.1986) (petition dismissed where financially sound debtor filed to avoid posting a supersedeas bond in pending state court litigation).

In light of these factors, we find no error with the bankruptcy court's determination that Dixie and Martin filed their petition in bad faith to justify lifting the stay. Contrary to the arguments of Dixie and Barclays, neither the bankruptcy court nor the district court improperly seized upon any single factor in determining the existence of bad faith. Rather, the cumulative effect of all the evidence was appropriately considered. As both the bankruptcy court and the district court noted, the petition was filed when it appeared that a ruling adverse to Dixie was imminent in state court litigation that had been underway for more than two years. Moreover, the state court litigation arose because Dixie had received a better offer for its radio station and refused to perform an executed sales agreement for the station. It does not appear

that Dixie was in financial distress and needed the protection of the bankruptcy court. It was substantially current on its debts and remained only secondarily liable on the Barclays loan which the debtors make much of. Its sales were increasing as the result of the relocation of a transmitter tower to a better site. Further, one year prior to the filing, Dixie began paying Martin a $5,000 per month consulting fee, and continued to pay more than $500 a month for a Lincoln Continental automobile which Martin used in Vermont. Dixie also paid $36,000 per year to Bramlett to manage the station and, about six months before the filing, increased Bramlett's wife's salary from $12,000 to $36,000 per year to keep the station's books. As the district court stated, "[t]hese facts are not indicative of a business in financial distress."

It seems clear that Dixie entered bankruptcy to get out of its bad deal. There was testimony that Mr. Bramlett told creditors that the petition was filed to prevent WBHP's purchase, that Dixie did not have financial problems, and that the petition was filed as a "diversionary tactic." This Court has found similar comments as one factor leading to a finding of bad faith. *In re Phoenix Piccadilly*, 849 F.2d 1393 (11th Cir.1988).

The bankruptcy code is not intended to insulate financially secure sellers or buyers from the bargains they strike. Thus, we hold that the bankruptcy court's factual findings are supported by the record, and are not clearly erroneous, and its conclusion as to bad faith for this purpose was correct as a matter of law. *In re Fielder*, 799 F.2d 656 (11th Cir.1986). Having found that, it was not an abuse of discretion for the bankruptcy court to grant relief from the automatic stay.

Because of this Court's resolution of the bad faith issue, we need not decide whether WBHP's claim was entitled to adequate protection.

The Remand Order

The parties, and apparently the district court, have treated the bankruptcy judge's order lifting the stay as an implicit denial of WBHP's motion to dismiss the bankruptcy petition. The district court had jurisdiction to consider the propriety of the denial because section 158 (a) empowers it, unlike the courts of appeal, to review interlocutory as well as final, orders of a bankruptcy court. *See In re Bertoli*, 812 F.2d 136 (3d Cir.1987) (denial of motion to dismiss adversary proceeding in Chapter 11 bankruptcy reviewable by district court without certification by bankruptcy judge).

Although the district court had authority to review the bankruptcy court's apparent denial of WBHP's motion to dismiss, we have no jurisdiction to review the resolution of that appeal. This Circuit has consistently held that a district court order remanding the case to the bankruptcy court is not a final decision for purposes of appeal. *In re Miscott Corp.*, 848 F.2d 1190 (11th Cir.1988); *In re Briglevich*, 847 F.2d 759 (11th Cir.1988); *In re TLC Investors*, 775 F.2d 1516 (11th Cir. 1985); *In re Regency Woods Apartments Ltd.*, 686 F.2d 899 (11th Cir.1982). In *Miscott*, this Court refused to entertain an appeal of a district court order which affirmed the bankruptcy court's determination of damages, but which included a remand to the bankruptcy court for further proceedings on the issue of attorneys' fees. The Court noted that an order including a remand may be considered final if "all that remains is the performance of a ministerial duty." 848 F.2d at 1192. (citations omitted.) However, the Court concluded that a determination of whether a bona fide settlement offer was made and rejected, entitling the offeror to an award of attorneys' fees, was more than a ministerial duty. In *Briglevich*, this Court dismissed an appeal from a district court order which included a remand requiring the bankruptcy court to redetermine damages under a construction contract, holding that the re-

mand required "significant proceedings" and thus, was not final. 847 F.2d at 761. Similarly in *TLC*, this Court held that it had no jurisdiction to review a district court remand to the bankruptcy court which instructed that court to conduct an adversary hearing on the question of whether a bankrupt would be required to sell certain property. Because the district court order "in no way determine[d] the merits of the case or any of the substantive rights of the parties," no appeal could be entertained. 775 F.2d at 1519.

Other circuits are in accord with this view. *See In re Bowman*, 821 F.2d 245 (5th Cir.1987) (district court order reversing bankruptcy court's dismissal of complaint and remanding for consideration of merits not final appealable order); *In re Ben Hyman & Co., Inc.*, 577 F.2d 966 (5th Cir.1978) (remand order for determination whether one creditor entitled to exercise a right of setoff not final order and not appealable); *In re Stanton*, 766 F.2d 1283 (9th Cir.1985) (remand to bankruptcy court for further factual findings in reconsideration of dismissal of counterclaim not a final, appealable order); *In re Riggsby*, 745 F.2d 1153 (7th Cir.1984) (remand to bankruptcy court for reconsideration under proper standard whether late filing of complaint was permissible was not final).

Other circuits have taken a different position, however. The leading case is *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3d Cir.1982), *cert. denied*, 459 U.S. 1207, 103 S.Ct. 1196, 75 L.Ed.2d 440 (1983), where the court held that a district court order reviewing and even remanding a final order of a bankruptcy court is final for purposes of section 158(d). *In re Gardner*, 810 F.2d 87 (6th Cir.1987) (reversal on question of insurance coverage and remand to bankruptcy court for determination as to whether a release was fraudulent was appealable order.) *See also In re Christian*, 804 F.2d 46 (3d Cir.1986) (district court order affirming bankruptcy court's denial of motion to dismiss is final for purposes of appeal).

The debtors argue that the Court should review the entire district court order because the central issue is the same for both portions of the order, that is, bad faith. They contend that the district court erred when it found bad faith for purposes of relief from the stay, but remanded to the bankruptcy court for consideration of bad faith for purposes of dismissing the petition. Their argument has merit only if it is indeed the case that once a bankruptcy court determines there is bad faith sufficient to justify relief from the automatic stay it must also dismiss the petition.

We disagree that bad faith constituting "cause" for relief from a stay automatically equates to bad faith warranting dismissal of the petition. If that were true, there would not be a need to ever lift a stay for bad faith, because the petition would necessarily have to be dismissed. That seems at odds with the intent of the Bankruptcy Code. It is at least inconsistent with the practice in many courts which have lifted a stay on a finding of bad faith but which nonetheless permit the petition to be maintained. *See, e.g., In re RAD Properties, Inc.*, 84 B.R. 827 (Bankr.M.D.Fla.1988); *In re Choctaw Boundary Farms, Inc.*, 72 B.R. 638 (Bankr.S.D.Miss. 1987).

That the bankruptcy court has seen fit to grant relief from the stay is not equivalent to a decision by that court that Dixie may not maintain its petition. Rather, the decision on whether to grant or deny relief from an automatic stay may be analogized to a decision whether or not to grant preliminary injunctive relief. The fact that preliminary relief is obtained does not mean that permanent relief also must be forthcoming. *University of Texas v. Camenisch*, 451 U.S. 390, 394-95, 101 S.Ct 1830, 1833-34, 68 L.Ed.2d 175 (1981) (decisions on preliminary injunctions are not "tantamount to decisions on the underlying merits"); *McArthur v. Firestone*, 817 F.2d 1548 (11th Cir.1987) (district court's denial of

temporary restraining order did not constitute decision on merits of First Amendment claim.). Likewise here, the purposes and considerations that weigh in the determination of relief from a stay are distinct from the inquiry into whether the proceeding may be maintained at all.

A panel of this Court stated in dicta in *In re Phoenix Piccadilly, Ltd.*, that "what amounts to bad faith is the same for both proceedings." 849 F.2d at 1394. We interpret that statement to mean that the factors used to demonstrate bad faith are the same in both contexts, but that a bankruptcy judge may nonetheless take into consideration the number of factors and their certainty in determining whether they constitute bad faith for dismissal purposes. Thus, on remand, the bankruptcy court must engage in this evaluative process. This involves more than ministerial duties and, accordingly, the district court's remand order cannot be considered a final, appealable decision.

The "Ghostwritten" Order

Finally, appellants contend that the appeal should be dismissed or the case remanded for further factual determinations, because the district court's order was allegedly "ghostwritten" by counsel for WBHP. This contention is not supported by the record.

This Circuit and other appellate courts have condemned the ghostwriting of judicial orders by litigants. *In re Colony Square Co.*, 819 F.2d 272 (11th Cir.1987); *cert. denied*, —— U.S. ——, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960 (5th Cir.1975); *Bradley v. Maryland Casualty Co.*, 382 F.2d 415 (8th Cir.1967). In *Colony Square*, this Court noted that the dangers of ghostwriting are obvious. "When an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming." 819 F.2d at 275. In that case,

the judge called counsel for the party for whom the judge intended to rule and asked counsel to draft the order. Opposing counsel was not notified of these *ex parte* contacts nor apprised that the opinion had been drafted by the other side.

Although this Court in *Colony Square* was highly critical of the practice, it nevertheless refused to find that the order was *per se* invalid. Rather, such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was "fundamentally unfair." *Id.* at 276. In that case, the Court concluded that the orders at issue were not subject to being vacated because it was clear that the judge had reached a firm decision before asking counsel to draft the orders and directed counsel to address specific points and reach a particular result.

The record here lends even less support for vacating the bankruptcy court order. Unlike *Colony Square*, the bankruptcy court made no secret of the request for a draft order, noting in open court in the presence of all counsel that he had asked WBHP counsel to draft an order because his secretary was out on sick leave. Neither Barclays nor the debtors requested to review the draft or to have an opportunity to make objections to it. Further, it is clear that the parties had ample opportunity to argue their case in the bankruptcy court through extensive briefs and oral argument and the district court also gave the case "independent consideration and analysis" which "serve[d] to correct any errors in the procedures used by the bankruptcy judge." *Colony Square*, 819 F.2d at 277.

AFFIRMED IN PART, DISMISSED IN PART.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case Nos. BK 87-00856, BK 87-00857

Civil Action No. 87-A-5358-NE

In the Matter of DIXIE BROADCASTING, INC., and
MARTIN BROADCASTING OF ALABAMA, INC.,
Debtors.

BARCLAYS-AMERICAN/BUSINESS CREDIT, INC.,
DIXIE BROADCASTING, INC., and MARTIN BROADCASTING,
Appellants,

v.

RADIO WBHP, INC.,
Appellee and
Cross-Appellant.

MEMORANDUM OPINION

[Filed Dec. 16, 1987]

This is an appeal from the Order of the United States Bankruptcy Court for the Northern District of Alabama which terminated the automatic stay provided under 11 U.S.C. § 362. Barclays-American/Business Credit, Inc. (hereafter Barclays), the major creditor of the debtors, brings this appeal. Radio WBHP, Inc., cross-appeals.

Debtor Dixie Broadcasting, Inc. (Dixie) owns affiliated AM and FM radio stations in Decatur, Alabama and holds the FCC licenses for both stations. Martin Broadcasting of Alabama, Inc. (Martin) was formed for the purpose of acquiring the stock of Dixie and is the sole

shareholder of Dixie. Martin has no business other than as a holding company for Dixie. Ronald Martin and Jack Bramlett are the president and vice-president, respectively, of both Dixie and Martin.

On May 10, 1984 Dixie executed a security interest in favor of Barclays extending and amending a prior guarantee of a loan with a principal of $1,000,000.00 secured by all of the real and personal property of Dixie, both tangible and intangible, used in connection with the FM radio station, including the FCC license and 100 percent of the issued and outstanding capital stock of Dixie. This agreement provided for the consent of Barclays to the sale of Dixie's assets.

Just prior to the above transaction, Dixie and WBHP had drawn up a Memorandum of Agreement relating to the proposed purchase by WBHP of Dixie's FM station. On May 17, 1984 Dixie and WBHP executed a Purchase Contract whereby WBHP was to purchase the FM station free and clear of all liens. The contract included a non-compete clause for both Dixie and Donald Martin. The purchase price was: $550,000 for the FM assets, $25,000 to Dixie in consideration of its non-compete agreement and $350,000 over six years to Donald Martin for his non-compete agreement. The purchase agreement provided, in part, that: (1) the execution and performance of the contract would not violate any contract or agreement by which seller is bound; (2) the obligation of seller to consummate the contract was subject to the prior fulfillment of certain obligations including obtaining the consent of Barclays unless waived by buyer. This contract was the culmination of approximately three years of negotiations between the parties.

Because the loan was in default, Barclays refused to consent to the sale of the FM station. WBHP waived the consent condition so as to proceed with the purchase. Dixie then refused to join WBHP in petitioning the FCC for a license transfer.

WBHP instituted suit in the Circuit Court of Madison County seeking specific performance of the contract and injunctive relief preventing Dixie from selling the FM station to any other party. (It had come to WBHP's attention that Dixie had been entertaining competing offers for the radio station and had received a higher bid than that recited in the contract). The state court litigation, with extensive filings, motions and hearings, went on for over two and one-half years. When the litigation was on the brink of resolution, Dixie and Martin filed the Chapter 11 petition which acted to automatically stay the state court suit until Judge Breland issued his Order lifting the stay to allow the state court to decide the pending suit.

Barclays, the creditor and intervenor in the state suit, brings this appeal. WBHP cross appeals.

Appellant Barclays, and the debtors, raise six issues all aimed at having the Section 362 stay reinstated. Barclays argues: 1.) the Bankruptcy Court did not consider the effect on the creditors and on the debtor and the significance to its own federal jurisdiction in determining "cause" for termination of the automatic stay; 2.) no compelling practical, legal or policy reasons exist to justify terminating the stay; 3.) Barclays' and debtors' positions are prejudiced by incorrect determinations of matters not adjudicated between the parties and improper reliance on arguments of WBHP counsel; 4.) the incorrect legal conclusions mislabeled as findings of fact in the Order prejudice Barclays' and debtors' positions; 5.) the incorrect conclusions of law as to specific performance in the Order violate FCC policy and established case law and contradict the Bankruptcy Court's professed abstention from this controversy between the parties; 6.) the unsupported findings of fact, the erroneous legal conclusions mislabelled as findings of fact and the incorrect and poorly cited conclusions of law are adequate grounds for reversal as prejudicial errors. (Appellant's Brief, pp. 3-4).

The applicable standard of review is found in Rule 8013 of the Bankruptcy Rules:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order or decree or remand with instruction for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witness.

The Eleventh Circuit held in *In re Fielder*, 799 F.2d 657 (11th Cir. 1986), that

> this court as an appellate court gives deference to all findings of fact by the fact finder if based upon substantial evidence, but freely examines the applicable principles of law to see if they were properly applied any freely examines the evidence in support of any particular finding to see if it meets the test of substantiality.

This court has reviewed the challenged Order in light of the allegations made according to the prescribed standards and is convinced that the Order is in all ways correct. Contrary to the arguments of appellant, the stay was due to be lifted. This court finds nothing in the Order clearly erroneous and certainly nothing amounting to prejudicial error. Therefore, the Order of June 17, 1987 terminating the automatic stay of litigation is affirmed.

In its cross appeal, WBHP claims that the Bankruptcy Court erred by failing to dismiss the debtors' petition for bad faith. Among the factual allegations in this case, the majority do a great deal more than merely intimate a bad faith filing.

It has been alleged that the $1,000,000.00 debt owed by Dixie to Barclays is a debt owed by Dixie solely by virtue

of the security agreement guaranteeing the debt. That is, that loan flowed to some other of Donald Martin's enterprises but was secured by Dixie.

The timing of many of the transactions relevant to this case speaks ill of the debtors' motives in filing a petition in Chapter 11: on April 11, 1984 Dixie and WBHP executed a Memorandum of Agreement to sell the FM station to WBHP for a specified sum; on May 10, 1984 Dixie extended and amended a prior guarantee of the Barclays' loan the terms of which included that Barclays held consent power to the sale of all or substantially all of Dixie's assets; on May 17, 1984 Dixie and WBHP executed the Purchase and Sale Agreement. Also on May 10, 1984, the date Dixie executed the security agreement with Barclays, Donald Martin sold one of his enterprises on which Barclays possessed a collateral assignment and lien.

Also worthy of note is the repeated appearance of the competing bidder, Colonial. WBHP first began negotiations for the purchase of Dixie's FM station in 1981. An agreement had almost been reached when Dixie accepted a bid from Colonial. The Colonial purchase fell through. WBHP again negotiated with Dixie for the purchase of the station. The purchase contract was executed and WBHP later learned of yet another higher bid tendered by Colonial.

Additionally, approximately six months prior to the filing of the petition, Mrs. Bramlett, the bookkeeper for Dixie and wife of the vice-president, received a $2,000.00 per month raise. In January preceding the filing, Donald Martin began receiving his $5,000.00 per month consulting fee per a pre-existing contract. Dixie also pays over $400.00 per month for the Lincoln automobile driven by Mr. Martin in Vermont where he lives. These facts are not indicative of a business in financial distress.

Yet another element of timing raises the spectre of bad faith: Dixie and Martin filed the petition during a break from a court ordered settlement negotiation session. The state court judge indicated his readiness to rule in the case and told the parties that he recommended a settlement. The judge instructed the parties to meet for the purpose of attempting to settle the case. The parties met as instructed. Dixie and Martin used the lunch break to file the petition in bankruptcy.

As a court of equity, the bankruptcy court has the inherent discretionary power to dismiss a petition when such is believed to have been filed for same purpose or motive other than that contemplated by the Code: rehabilitation or reorganization under Chapter 11. *In re Lotus Inv., Inc.*, 16 Bankr. 592 (Bankr. S.D. Fla. 1931). The implicit good faith requirement acts to protect the jurisdictional integrity of the bankruptcy court by preventing its use as a forum where artifice, scheme, manipulation and ulterior motive find haven amid statutory protections intended for the sincere debtor. *In re Northwest Recreational Activities, Inc.*, 4 Bankr. 36 (Bankr. N.D. Ga. 1980). This discretionary power to dismiss that petition which fails the test of good faith also offers protection to those who would be harmed or unfairly dealt with by the self-styled debtor. Abuse of the bankruptcy courts and process can not be tolerated.

Because the motive, intent and need of the debtors is questionable, this court remands this case to Judge Breland on the bad faith issue with instructions to hold a hearing and make a finding as to debtors good faith in filing the Chapter 11 petition. If Judge Breland, xx hearing, finds good faith the Order lifting the stay will still be xx place per the affirmance of that Order above. Should Judge Breeland xx bad faith, the petition must be dismissed.

Therefore, this case is affirmed in part and remanded with instructions in part.

An appropriate order in conformity with this opinion will be entered.

This the 16th day of December, 1987.

/s/ [Illegible]
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case No. BK 87-00856, BK 87-00857

Civil Action No. 87-A-5358-NE

IN THE MATTER OF DIXIE BROADCASTING, INC.,
and MARTIN BROADCASTING OF ALABAMA, INC.,
Debtors.

BARCLAYS-AMERICAN/BUSINESS CREDIT, INC.,
DIXIE BROADCASTING, INC., and MARTIN BROADCASTING,
Appellants,

v.

RADIO WBHP, INC.,
Appellee and
Cross-Appellant.

ORDER

In conformity with and pursuant to the memorandum opinion of the court contemporaneously entered herewith,

It is ORDERED, ADJUDGED and DECREED that this case be, and the same hereby is, AFFIRMED in part and REMANDED to the Bankruptcy Court with instructions in part.

DONE, this the 16th day of December, 1987.

/s/ [Illegible]
Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-7035

D.C. Docket No. 87-5358

IN RE: DIXIE BROADCASTING, INC., and
MARTIN BROADCASTING OF ALABAMA, INC.,
Debtors.

BARCLAYS-AMERICAN/BUSINESS CREDIT, INC.,
Plaintiff-Appellant,

DIXIE BROADCASTING, INC., and MARTIN BROADCASTING,
Plaintiffs-Appellants,

versus

RADIO WBHP, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and TIDWELL*, District Judge.

JUDGMENT

[Filed ————————]

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and DISMISSED in part, in accordance with the opinion of this Court;

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Case No. 87-00856
Chapter 11 Proceeding

Case No. 87-00857
Chapter 11 Proceeding

IN RE DIXIE BROADCASTING, INC.,

and

MARTIN BROADCASTING OF ALABAMA, INC.,
Debtors

ORDER TERMINATING STAY
IN ORDER TO ALLOW
CONTINUANCE OF STATE COURT PROCEEDING

[Filed June 5, 1987]

This matter came to be heard on the motion of Radio WBHP, Inc. ("WBHP") to dismiss the petition in bankruptcy or, in the alternative, for relief from the automatic stay so as to permit WBHP to continue its state court civil action commenced against Dixie Broadcasting, Inc. ("Dixie"), and service having been made upon Dixie and after hearing the evidence and argument of counsel, and after having considered all of the motions, exhibits, responses, legal authorities submitted by the parties, and other matters, the Court makes the following findings:

FINDINGS OF FACT

Introduction.

1. On January 30, 1987, Martin Broadcasting of Alabama, Inc. ("Martin Broadcasting") and Dixie filed

voluntary petitions in bankruptcy under the provisions of Chapter 11, Title 11 of the United States Code (the "Bankruptcy Code"). Martin Broadcasting owns all the stock of Dixie and has no other assets other than this wholly owned subsidiary. At all relevant times, Donald G. Martin ("Martin") was the majority shareholder and president of Martin Broadcasting, owning 90% of the outstanding stock and J. Mack Bramlett ("Bramlett") was vice-president, owning the remaining 10% of the outstanding stock of Martin Broadcasting.

2. Dixie is the owner and licensee of two commercial broadcasting stations known as WDRM-FM and WHOS-AM, whose studios are located in Decatur, Alabama. Dixie has no other assets other than these two radio stations.

3. By order dated March 25, 1987, the Bankruptcy Court authorized the procedural consolidation of the bankruptcy cases of Martin Broadcasting and Dixie.

4. WBHP owns and operates a "stand alone" AM radio station located in Huntsville, Alabama, known as WBHP-AM. W. H. Pollard, Jr. ("Pollard") is the owner of substantially all of the stock of WBHP.

5. On May 17, 1984, WBHP and Dixie and Martin entered into a Purchase and Sale Agreement wherein Dixie agreed to sell all of the assets of Dixie incident to the operation of WDRM-FM and to apply with WBHP to the Federal Communications Commission ("FCC") for the transfer of WDRM's FCC broadcasting license (hereinafter referred to as the "Purchase and Sale Agreement").

6. The property interest sought to be conveyed through the Purchase and Sale Agreement is of a unique nature in that it is not otherwise available or obtainable. While Dixie owns an interest in the personal property, good will and other incidents to the broadcasting rights exercised under WDRM, it does not own the FCC broadcast-

ing license for WDRM itself. The FCC license at all times remains the property of the citizens of the United States which the licensee, in this case Dixie, holds in trust pursuant to a grant from the FCC.

7. A full understanding of the Court's opinion also requires an explanation of the difference between a "stand alone" AM station and an AM station operated in conjunction with an FM station. Stand alone AM stations are AM stations which are not operated in conjunction with an FM station and, therefore, must be able to create a market separate and apart from any other advertising media. Most of the AM stations in this country are "stand alone" stations. Occasionally, the FCC licensee of an AM station also possesses the FCC license of a neighboring FM station, as in the present case involving WDRM and WHOS.

History and Analysis of the Scheduled Debts of Dixie.

8. In 1979, Martin and Bramlett were engaged in businesses involving coal mining and leasing of coal mining equipment through various corporations and joint venturers, including Continental Sales, Inc. ("Continental"), Development Associates ("Development") and Hartselle Mining Corporation ("Hartselle"). Additionally, both Martin and Bramlett owned radio and television stations in Vermont and Alabama through corporations, including Dixie, Martin Broadcasting, Martin Broadcasting, Inc. and International Television Corporation ("International"). Neither Continental, Hartsell, Development, International nor Martin Broadcasting, Inc. ever engaged in business with Dixie or Martin Broadcasting. At all times they were related entities involving separate businesses.

9. In 1979, in connection with its coal mining and related operations, Continental borrowed, and later Development assumed, 1.5 million dollars from Aetna Business Credit, Inc. ("Aetna") (hereinafter referred to as the "Debt"). Later, Barclays American/Business Credit,

Inc. ("Barclays") became the assignee of the Debt from Aetna. Subsequent to 1979 and in order to further secure the Debt, Bramlett and Martin pledged or caused Martin Broadcasting and Dixie to execute security agreements pledging all of their assets, including the stock of the two corporations, as additional security for the Debt and to cause Dixie and Martin Broadcasting to also guarantee the Debt, notwithstanding that no benefit from the Debt accrued to Dixie or Martin Broadcasting. Finally, on May 10, 1984, Bramlett and Martin caused Dixie to execute another Security Agreement, Continuing Guaranty Agreement and UCC-1 Financing Statement in favor of Barclays further securing the Debt incurred by Continental and assumed by Development.

10. With respect to the current financial condition and operation of Dixie, Bramlett receives $36,000.00 per year as station manager of WHOS and WDRM and his wife receives $36,000.00 per year as bookkeeper. Up until July 1986, Mrs. Bramlett had been receiving a salary of $1,000 per month or $12,000 annually as bookkeeper; however, in July 1986, she received a $2,000 per month raise for an annual salary of $36,000.00.

11. Martin is paid $60,000.00 a year as a consulting fee by Dixie. Although Martin's consulting agreement had been in existence since November 1, 1982, he only began to be paid $5,000 per month from January 1, 1986 through March 1987. In addition to his $5,000 per month consulting fee, Martin also receives the use of a 1986 Lincoln Continental automobile, notwithstanding the fact that the management agreement does not provide that Martin is to receive any other compensation or benefits other than the $60,000.00 per year fee. Dixie is presently making monthly payments of $581.25 to Ford Motor Credit Company on behalf of Martin for the 1986 Lincoln Continental. Martin uses for his personal use the Lincoln Continental provided by Dixie in Stowe, Vermont, where he presently resides.

12. Substantially all of the obligations of Dixie were paid on a current basis prior to the filing of bankruptcy on January 30, 1986. Although Dixie scheduled over $690,000.00 worth of unsecured creditors, if disputed claims of the IRS and the insider debts are eliminated, the unsecured obligations are in reality approximately $74,500.00, which is in the range of the accounts payable shown on the 1983, 1984 and 1985 federal tax returns filed by Dixie. To illustrate, Dixie's 1985 tax return shows a beginning accounts payable of $61,558.00 and an ending accounts payable of $64,900.00; Dixie's 1984 tax return shows a beginning accounts payable of $71,887.00 and an ending accounts payable of $61,558.00; and Dixie's 1983 tax return shows a beginning accounts payable of $65,321.00 and an ending accounts payable of $71,887.00. In addition, a substantial amount of the insider debts allegedly owed by Dixie are over two years old and Dixie has not made any payments on such debts.

13. During the last year, the financial situation of Dixie has been substantially improving, with increasing sales as a result of the moving of the FM transmitter tower of WDRM to a better location. Dixie's revenues are approximately double what they were twelve months ago and will increase at approximately the same rate over the next twelve months.

Events Preceding the Execution of the Purchase and Sale Agreement.

14. Since approximately 1981, Dixie has been interested in selling WDRM-FM and WHOS-AM. During the late 1970s and early 1980s, Pollard became interested in expanding his communications business to include the acquisition of an FM broadcasting radio station in Northern Alabama.

15. When Pollard heard that WDRM might be for sale in 1981, he not only contacted Martin and Bramlett directly, but he also came in contact with J. William

Chapman ("Chapman") of Chapman Associates, a brokerage firm specializing in the communication industry located in Atlanta, Georgia that had been retained by Dixie at Martin's behest to market the sale of WDRM and or WHOS. Initially, Martin had suggested that he was willing to sell WDRM for $1.2 million dollars.

16. Negotiations and discussions occurred between Martin and Pollard, through Chapman, until Pollard learned from Chapman that Colonial Broadcasting Company, Inc. ("Colonial") of Mobile, Alabama, had entered into a purchase and sale agreement with Dixie to buy WDRM for $875,000.00 in late 1983. Shortly thereafter, however, Chapman informed Pollard that the Colonial transaction did not close and that WDRM was still for sale.

Execution of Purchase and Sale Agreement.

17. Pollard and Martin, through the offices of Chapman, resumed an intensive and lengthy series of arms-length negotiations to purchase and sell WDRM in early 1984. On April 11, 1984, Dixie and WBHP executed a Memorandum of Agreement to sell WDRM to WBHP. Further discussions ensued which resulted in the execution of the Purchase and Sale Agreement on May 17, 1984 between Dixie and WBHP for the sale of WDRM's assets for the purchase price of $550,000.00. The Purchase and Sale Agreement was subsequently amended on May 22, 1984 to reflect an apportionment of the purchase price.

18. With respect to the terms and conditions of the Purchase and Sale Agreement, Dixie promised to sell and transfer the following material assets to WBHP:

(a) All machinery, equipment, leasehold improvements and tangible property of every kind and nature owned by Seller and used in or incidental to the operation of the Station now located at the Station premises at 401 14th Street, S.E.,

Decatur, Alabama, and at any other location (herein "Tangible Assets"), all of which are more specifically described in a listing thereof attached hereto and identified as Exhibit A, together with any replacements thereof of comparable use and value in the usual and ordinary course of business and additions thereto made between the date hereof and the Closing Date.

(b) The License listed in Exhibit B issued by the Federal Communications Commission for the operation of the Station (herein "FCC License"); subject, however, to the consent of said Commission; and

(c) All licenses, agreements, contracts, trademarks, service marks, franchises, copyrights, permits, property rights and interests, jingles, program rights, WDRM call letters and other intangibles of every kind and nature owned by Seller and used in, incidental to, or arising from the operation of the Station, herein "Intangible Assets'), being substantially those assets identified in a listing thereof attached hereto as Exhibit B, copies of which Buyer acknowledges having previously received from Seller, except as otherwise indicated on Exhibit B. It is expressly understood that with respect to agreements other than those involving the sale of broadcast time for cash substantially at rate card, all of which sales agreements shall be disclosed to Buyer no later than ten (10) days prior to the Closing Date as established under Section 7. hereof, the only agreements which Buyer is obligated to assume are those specified in Exhibit B. With respect to agreements for the sale of time on the Station, Buyer will assume only the following: All agreements for the sale of time on the Station for cash substantially at Seller's present rate cared and entered into within sixty

> (60) days of the Closing Date and disclosed to Buyer as provided hereinabove: provided, however, that such agreements shall be subject to adjustment in accordance with Section 6, hereof. Further, it is understood that no commissions will be payable by Buyer for advertising contracts unless sold by a recognized Station representative under contract and in no event shall any such commission exceed 15% of gross.

In addition to the aforementioned assets, Dixie agreed to join with WBHP in an application to the Federal Communications Commission requesting written consent to the assignment of WDRM's FM license from Dixie to WBHP.

19. As a part of the consideration for the Purchase and Sale Agreement, Martin, Dixie and WBHP also entered into a separate non-competition agreement which prevented Martin from engaging in certain described activities relating to the operation of an FM broadcast station and/or any radio facility having a country western format. As consideration for the non-competition agreement, Martin was to receive the total sum of $350,000.00. Also, Dixie entered into a separate non-competition agreement for a consideration to it of $25,000.00.

20. Unknown to WBHP and Pollard and notwithstanding the executed Memorandum of Agreement and Purchase and Sale Agreement, as amended, Dixie and Martin were entertaining competing offers to purchase WDRM. Those discussions resulted in a second offer by Colonial to purchase WDRM from Dixie for a purchase price of $1,250,000.00. Dixie received the Colonial offer only a few days after the execution of the Purchase and Sale Agreement between Dixie and WBHP.

21. After the execution of the Memorandum of Agreement and just prior to the execution of the Purchase and Sale Agreement, Martin also caused Dixie to execute a more exhaustive and comprehensive security agreement

and financing statement on May 10, 1984 in favor of Barclays to further secure the Debt of Development. Martin caused Dixie to execute the more comprehensive and exhaustive security agreement and financing statement at the same time he and Dixie were covenanting to sell the assets of WDRM free and clear of all liens and encumbrances. Martin did not disclose any of the transactions between Dixie and Colonial or Dixie and Barclays to WBHP or Pollard.

22. After the Purchase and Sale Agreement, and the amendment thereto were executed, WBHP filed with the FCC its portion of the request for the transfer of the FCC license from WDRM to WBHP. Dixie, however, did not join in the application as required in the Purchase and Sale Agreement and subsequently, Dixie, through its attorney Andrew Field, informed WBHP that Barclays objected to the transfer of WDRM's assets to WBHP and, therefore, Dixie would be unable to perform its obligations under the Purchase and Sale Agreement. Pursuant to the terms of the Purchase and Sale Agreement, WBHP elected to waive the necessity of obtaining Barclays' consent and to proceed to close the sale.

23. The importance to Pollard and WBHP of completing the sale is found in the "unique" property of an FCC broadcasting license. It is not subject to compensation through money damages and is irreplaceable. Martin, Bramlett and Dixie recognized that money damages would not adequately compensate WBHP for loss of the station in paragraph 31 of the Purchase and Sale Agreement itself, when they agreed that:

> Seller recognizes that the assets and license to be conveyed hereunder cannot be readily obtained in the open market and that Buyer will be irreparably injured in the event this Agreement is not specifically enforced. Therefore, Buyer not being in default hereunder, and being able to specifically perform its own obligations hereunder, shall be en-

titled to specific performance of this Agreement by Seller. In the event Buyer shall institute any action specifically to enforce Seller's performance under this Agreement, in lieu of declaring the Agreement null and void, Seller agrees to waive the defense that Buyer has an adequate remedy at law and to interpose no opposition, legal or otherwise, as to the propriety of specific performance, per se, as a remedy. Buyer's right to specific performance shall be in addition to and not in lieu of, any other remedies for damages that Buyer may elect to pursue.

State Court Litigation.

24. On July 3, 1984, WBHP filed suit in the Circuit Court of Madison County, Alabama, pending as Case No.: CV84-750L, against Dixie and Martin seeking specific performance of the Purchase and Sale Agreement and an injunction prohibiting Dixie from entering into a contract with any third party to transfer WDRM's assets (hereinafter referred to as the "Civil Action"). On July 5, 1984, the Honorable Lynwood Smith, Jr. of the Circuit Court of Madison County, Alabama, issued an ex parte Temporary Restraining Order preventing Martin or Dixie from transferring WDRM to any party other than WBHP.

25. A hearing was conducted on September 6, 1984 on WBHP's request for a Preliminary Injunction during which the Court received evidence and entertained oral argument from all parties. Thereafter, the parties filed lengthy briefs in support of their respective positions. On September 14, 1984, Judge Smith enjoined Dixie and Martin from transferring WDRM to anyone except WBHP.

26. Subsequently, Barclays was permitted to intervene in the Civil Action, file pleadings, briefs and submit evidence to the court. Soon thereafter, WBHP filed a Motion for Partial Summary Judgment, request-

ing Judge Smith to order Dixie to specifically perform the contract and to join WBHP in filing an application before the FCC to transfer the license of WDRM to WBHP. Dixie, Martin and Barclays opposed WBHP's motion and submitted argument, evidence and briefs to Judge Smith. After considering all of the evidence, arguments and legal authority submitted on behalf of all of the parties during one and one-half years of litigation, Judge Smith granted WBHP's Motion for Partial Summary Judgment on February 21, 1986 and ordered Dixie to join with WBHP on an application before the FCC to transfer WDRM's license to WBHP.

27. Barclays and Dixie moved the Circuit Court to set aside the Order granting WBHP's Motion for Partial Summary Judgment on the grounds that the Court had failed to consider the May 10, 1984, security agreement Martin had caused Dixie to execute in favor of Barclays. Prior to the hearing on Barclays' and Dixie's motion, the Court received additional evidence in the form of affidavits and briefs from Dixie, Martin and Barclays. At the hearing on Barclays' and Dixie's Motion, Judge Smith, after entertaining arguments from counsel, candidly admitted that he had overlooked the May 10, 1984, security agreement. In his Order dated June 16, 1986, vacating the partial summary judgment, Judge Smith held that even if he ruled in favor of WBHP on all issues, the bare license [1] question would still have to be addressed by the FCC, and therefore, he directed WBHP to file for a declaratory ruling before the FCC on the bare license issue.

28. After further consultation with its FCC attorneys, WBHP filed a motion before Judge Smith to reconsider setting aside the Order of Partial Summary Judgment

[1] Martin and Dixie had argued during the hearing that transfer of the license to WBHP without the assets tied up through Barclays' security interest would violate FCC policy against approving the transfer of a "bare license."

and a hearing was held on that motion on December 5, 1986. Prio to the hearing on WBHP's motion, WBHP and Dixie submitted to the Court, through their respective FCC counsel, lengthy briefs on the FCC "bare license" issue. After approximately two hours of argument, Judge Smith informed the parties and their attorneys that he found the position advanced by WBHP's FCC counsel persuasive. He stated that he was ready to rule in WBHP's favor and to direct Dixie to file an application before the FCC to transfer the FCC broadcasting license of WDRM to WBHP. During the hearing, Judge Smith told Andrew Field ("Field"), counsel for Dixie and Martin, pointedly that the brunt of the Court's order would come down on Martin's and Dixie's head. Thereafter, Judge Smith informed all the parties that in his opinion the litigation, which had already lasted two years, should be settled. He then informed those present that he had to adjourn the hearing for approximately two hours during which time he ordered those present to meet to try to settle the case.

29. There is no doubt that on December 5, 1986, and at all times thereafter, all the parties fully expected Judge Smith to rule in WBHP's favor directing Dixie and Martin to specifically perform their obligations under the Purchase and Sale Agreement.

30. By this time, the litigation had resulted in numerous hearings, the presentation of voluminous evidence, substantial briefs, association of expert counsel in FCC matters by all parties, counterclaims and crossclaims. Out of the litigation had come no fewer than three orders from Judge Lynwood Smith containing extensive findings of fact and conclusions of law on myriad contested matters, as well as extensive proceedings before the FCC.

31. The parties and their attorneys met in Huntsville, Alabama, on January 30, 1987 at approximately 9:30 a.m. to negotiate a settlement as instructed by

Judge Smith. There ensued intensive settlement negotiations for over three hours after which Martin and Field proposed an offer of settlement to Dixie and Pollard. At approximately the noon hour, Martin and Field suggested that the parties separate for lunch so that Martin could contact his tax attorney and determine the ramifications of his offer, and so that Pollard and his attorneys could discuss a response to the offer suggested by Martin. The parties and their attorneys agreed to reconvene at 1:30 p.m. The parties and attorneys representing Pollard and WBHP did reconvene at 1:30 p.m. and waited for Martin and his attorneys. At approximately 1:40 p.m., WBHP's attorneys received a call from Martin who informed them that they had used the lunch hour to file petitions in bankruptcy on behalf of Dixie and Martin Broadcasting.

Proceedings in Bankruptcy

32. Promptly after Dixie filed its petition in bankruptcy, on or about February 23, 1987, WBHP filed its Motion to Dismiss, or in the Alternative, for Relief From Stay.

33. On or about March 24, 1987, Dixie filed its Motion to Reject the Purchase and Sale Agreement by and among Dixie, Martin and WBHP pursuant to Section 365 of the Bankruptcy Code.

34. An FCC broadcasting license is not readily obtainable in the open market and at the present time there are no other FCC FM broadcasting station licenses available in the North Alabama market. As a result of the unique nature of an FCC broadcasting license and the present non-availability of a substitute license, the Court finds that WBHP's interest is not adequately protected.

35. The Court also finds that Dixie filed its petition in bankruptcy for the primary purpose of (1) avoiding the consequences of an anticipated adverse state court decision; (2) relitigating the same controversy between

the two parties in bankruptcy forum; and (3) invoking the automatic stay provision to evade the pending state court litigation. The Civil Action has been pending in state court for over 2½ years and was on the verge of being judicially determined when Dixie filed its petition in bankuptcy in order to obtain a last-minute escape chute out of the civil litigation. Such action on the part of Dixie and its representation constitutes bad faith and, therefore, sufficient cause exists to grant WBHP relief from the stay.

CONCLUSIONS OF LAW

Having reached conclusions of fact from the testimony and exhibits offered in open court, this Court applies to those facts the following conclusions of law:

1. Courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity; there is an overriding consideration that equitable principals govern the exercise of bankruptcy jurisdiction. *Bank of Marin v. England*, 385 U.S. 199, 87 S. Ct. 274 (1966); *Pepper v. Lotion*, 308 U.S. 295, 60 S. Ct. 238 (1939); *Wahl v. McInver*, 773 F. 2d 1169 (11th Cir. 1985); *Barnca v. Security Benefit Life Ins. Company*, 773 F. 2d 1158 (11th Cir. 1985); *In the Matter of Garfinkel*, 672 F.2d 1340 (11th Cir. 1982); *In re Compass Van & Storage Corp.*, 65 B.R. 1007 (Bankr. E.D.N.Y. 1986).

2. Contracts involving the sale of licenses or franchises that are not readily obtainable in the open market are the types of contracts that are properly subject of an order compelling specific performance of the contract. *Oden v. King*, 216 Ala. 504, 113 So. 609 (1927); *Hogan v. Norfleet*, 113 So. 2d 437 (Fla. 1959); *Cochrane v. Szpakowski*, 49 A. 2d 692 (Pa. 1946); *Unatin 7-Up Company v. Soloman*, 39 A. 2d 835 (Pa. 1944).

3. A license of the Federal Communications Commission is a unique item of personal property, not readily

available on the open market. *Wooster Republican Printing Company v. Channel 17, Inc.*, 533 F. Supp. 601 (W.D. Mo. 1981); *Friendly Broadcasting Company v. Hawaiian Paradise Park Corporation*, 282 F. Supp. 464 (D. Hawaii 1967).

4. In reviewing the "good faith" requirements, a court should use its equitable powers to reach an appropriate result in individual cases. In finding a lack of good faith, courts have emphasized an intent to abuse the judicial process and the purposes of the reorganization provisions. *In re Albany Partners, Ltd.*, 749 F. 2d 670 (11th Cir. 1984).

5. Chapter 11 was designed to give those teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual and other liability. The automatic stay was not intended to grant defendants a last minute escape chute out of pending litigation. *Furness v. Lillienfield*, 35 B.R. 1006 (Bankr. D. Md. 1983).

6. Chapter 11 is not a device primarily to be used to escape proceedings in other courts. *In re Little Creek Development Co.*, 54 B.R. 510 (Bankr. N.D. Texas 1985); *In re Setzer (Setzer v. Hot Productions, Inc.*, 47 B.R. 340 (Bankr. E.D.N.Y. 1985); *In re Wally Findlay Galleries, (New York) Inc.*, 36 B.R. 849 (Bankr. S.D.N.Y. 1984); *In re Cook*, 104 F. 2d 981 (7th Cir. 1939).

7. The bankruptcy laws are intended as a shield, not as a sword. If Dixie seeks protection of the bankruptcy law solely to avoid the enforceability of a contract that was negotiated at arms length but which Dixie feels is now less attractive than it should have been, the difference attributable to changes in the economic climate and not to the debtor's financial situation, such use of the bankruptcy laws is rapacious and not to be countenanced. *In re Waldron*, 75 F. 2d 936 (11th Cir. 1986).

8. On the request of a party in interest and after notice and a hearing, the Court shall grant relief from the stay provided under section 262(a), such as by terminating, annulling, modifying, or conditioning such the stay provided under section 362(a), such as by of an interest in property of such party in interest. 11 U.S.C. Section 362(d)(1).

THEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the automatic stay afforded by 11 U.S.C. 362 is hereby terminated in order to permit WBHP to continue its civil action pending in the Circuit Court of Madison County, Alabama, as Case No. CVS4-750L, wherein WBHP is seeking specific performance of the Purchase and Sale Agreement against Dixie and Martin, and to pursue such other relief which the Circuit Court for Madison County, Alabama may determine it is entitled under applicable Alabama state law; and it is further

ORDERED, ADJUDGED AND DECREED that, in the event that Circuit Court of Madison County, Alabama, enters a judgment granting specific performance of the Purchase and Sale Agreement in favor of WBHP and against Dixie and Martin, WBHP may proceed to enforce said specific performance against Dixie without the necessity of seeking further relief from this Court.

DONE AND ORDERED this the 5th day of June, 1987.

/s/ Edwin D. Breland
EDWIN D. BRELAND
United States Bankruptcy Judge

APPENDIX F

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case No. 87-0856

IN THE MATTER OF DIXIE BROADCASTING, INC. & MARTIN BROADCASTING OF ALABAMA, INC.,
Debtor

v.

RADIO WBHP, INC.,
Movant

Decatur Alabama
March 25, March 26, 1987 and June 5, 1987
Motion to Dismiss or in the Alternative, a
Motion Relief from Automatic Stay

VOLUME III

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWIN D. BRELAND
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor:

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116 South Jefferson Street
Huntsville, Alabama 35801

* * * *

[444] THE COURT: Okay, my inclination is to abstain and lift the stay, let the matter go back to the Circuit Court for conclusion. I've researched, read your briefs and all of that. I am of the opinion that this is a contract subject to specific performance and where it stays here or goes back there for the Order, the result would be the same. Assuming that, I think, ya'll have a feeling that the Circuit Court is probably going to uphold the contract. I don't know that and I'm not second guessing Judge Smith.

MR. WHITTINGTON: We probably don't agree on many things, but I think we all probably agree on that.

THE COURT: But I think it would be subject to the same state law. The Law of Alabama seems to be fairly clear that a franchise type thing, be the subject to specific performance. Of course, there is another matter, how would you ever measure the damages if you voided the contract. I don't know what measure you what the yard stick you would use for measuring damages in this type thing. That's my inclination and I don't know. My secretary has been on vacation and is now fixing to take at least a months sick leave, because of some problems and I had asked John to propose me an order along those lines. I have not read your order, you submitted it today and I haven't even read it.

* * * *

APPENDIX G

SECTION 362 (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward con-

tracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [*sic*]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security

interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

(c) Except as provided in subsection (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

SECTION 365 (11 U.S.C. § 365)

§ 365. Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provide adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f),

adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether

or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d) (1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section

365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f) (1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is pro-

vided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1307, or 1208 of this title at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1307, or 1208 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h) (1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, or a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller, the lessee or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee or timeshare interest purchaser to treat such lease or timeshare plan as terminated by virtue of its own terms, applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee or timeshare interest purchaser under applicable nonbankruptcy law.

(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (1) of this subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or moneys due for such timeshare interest for the balance of the term after the date of the rejection of such lease or timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by the nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

(i) (1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property of timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for

the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541 (b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

11 U.S.C. § 1112. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—

(1) the debtor is not a debtor in possession;

(2) the case originally was commenced as an involuntary case under this chapter or

(3) the case was converted to a case under this chapter other than on the debtor's request.

(b) Except as provided in subsection (c) of this section, on request of a party in interest *or the United States trustee*, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—

(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) inability to effectuate a plan;

(3) unreasonable delay by the debtor that is prejudicial to creditors;

(4) failure to propose a plan under section 1121 of this title within any time fixed by the court;

(5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;

(7) inability to effectuate substantial consummation of a confirmed plan;

(8) material default by the debtor with respect to a confirmed plan; [or]

(9) termination of a plan by reason of the occurrence of a condition specified in the plan; or

(10) *nonpayment of any fees or charges required under chapter 123 of title 28*

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—

(1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title [et seq.], such conversion is equitable.

(e) Except as provided in subsection (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter [11 USCS §§ 1101 et seq.] to a case under chapter 7 of this title [11 USCS §§ 701 et seq.] or may dismiss a case under this chapter [11 USCS §§ 1101 et seq.], whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521 [11 USCS § 521(1)], including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

(f) [(e)] Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.